LAW OFFICE

McLEOD, WATKINSON & MILLER

MICHAEL R. McLEOD
WAYNE R. WATKINSON
MARC E. MILLER
RICHARD T. ROSSIER
CHARLES A. SPITULNIK
RICHARD PASCO
ALEX MENENDEZ
PAUL D. SMOLINSKY

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, D.C. 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

KATHRYN A. KLEIMAN*
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

JOSEPH T. CONNOR
FINANCIAL ANALYST

January 10, 2002

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: *Salt Lake City Corporation –Adverse Abandonment – in Salt Lake City, Utah*, Docket No. AB 33 (Sub-No. 183)

Dear Sir:

I am enclosing an original and ten (10) copies of each of the following documents:

1) Reply Of Salt Lake City Corporation To Motion Of Union Pacific Railroad For A Protective Order Denying Discovery; 204365

2) Motion Of Salt Lake City Corporation To Compel; and 204366

3) Petition Of Salt Lake City Corporation For Extension Of Time To File Reply To Protest Of Union Pacific Railroad 204367

in the above referenced matter. I am also enclosing a 3.5 inch diskette with these documents.

In addition, I have enclosed one additional copy of these documents for date stamp and return to our messenger.

Thank you.

Sincerely,

Charles A. Spitulnik

Charles A. Spitulnik

Enclosures

cc: All parties on the Certificate of Service

204365

Before the
Surface Transportation Board

Docket No. AB 33 (Sub No. 183)

SALT LAKE CITY CORPORATION
- ADVERSE ABANDONMENT OF RAIL LINE IN SALT LAKE CITY, UTAH –

REPLY OF SALT LAKE CITY CORPORATION TO MOTION OF UNION PACIFIC RAILROAD FOR A PROTECTIVE ORDER DENYING DISCOVERY

CHARLES A. SPITULNIK
ALEX MENENDEZ
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001
(202) 842-2345

ROGER F. CUTLER
STEVEN W. ALLRED
CHRISTOPHER E. BRAMHALL
Salt Lake City Attorney
451 South State Street
Room 505
Salt Lake City, Utah 84111
(801) 535-7788

Counsel for Salt Lake City Corporation

Dated: January 10, 2002

Before the
Surface Transportation Board

Docket No. AB 33 (Sub No. 183)

SALT LAKE CITY CORPORATION
- ADVERSE ABANDONMENT OF RAIL LINE IN SALT LAKE CITY, UTAH -

REPLY OF SALT LAKE CITY CORPORATION TO MOTION OF UNION PACIFIC RAILROAD FOR A PROTECTIVE ORDER DENYING DISCOVERY

Salt Lake City Corporation (the "City"), through counsel, hereby responds to the Motion of Union Pacific Railroad Company ("UP") for a Protective Order Denying Discovery. The rules enunciated in the cases UP cites and the policies that underlie them do not apply with equal force to an adverse abandonment case where the railroad has all the information and the public party seeking adverse abandonment has virtually none. Discovery is appropriate in this case and UP's Motion for a Protective Order should be denied.

I. INTRODUCTION

The City does not deny that its discovery requests came to UP several months after this dispute came to the fore, but the only delay tactics here are UP's not the City's. The City asked UP several months ago to honor its commitments under the Franchise Agreement[1]. The City's request met with righteous indignation, refusal and lack of support for the explanations the railroad threw back at the City. The City has specifically chosen not to seek any delay to UP's

[1] The City will reply in due course to UP's view of the meaning of this Agreement on January 14, 2002, the time specified in the Board's Order for filing a response to UP's Protest, unless the Board grants the City's pending

. . . footnote continued on next page

restart of operations over the 900 South Line, resting instead on reminders to UP that it is proceeding with the new operations at its own risk. While the City has asked this Board to hold the proceedings in abeyance pending outcome of the proceedings in the U.S. District Court[2], the City specifically denies UP's allegation that the discovery requests were filed at a time when the only possible outcome could be delay. UP is wrong on that point (among others).[3]

The City filed its Application for Adverse Abandonment quickly in order to demonstrate to UP and to this Board that it understood the implications and application of this Board's jurisdiction over UP's operation. When UP refused to honor its commitments under the Franchise Agreement and came to this Board seeking declaratory relief, the City had no choice but to move quickly to put UP and this Board on notice that it would expect this Board to refuse to countenance UP's conduct. Any applicant in an adverse abandonment proceeding is at a disadvantage because most of the information required to support such an application is in the hands of the railroad. The Board typically acknowledges this by granting waivers from many of the informational requirements, as it has done in this case. The City has, to the best of its ability to do so, put forth its entire affirmative case. The City then began to prepare discovery, attempting based on previous statements and allegations from UP to divine the arguments the railroad would make and to seek information from UP that would permit the City to respond

---

Petition to Hold the Proceedings in Abeyance, or its motion for extension of time to reply to UP's Protest filed simultaneously herewith.

[2] UP has quickly replied to the City's Petition and under the Board's rules, the City has no opportunity to reply.

[3] UP's objection on this point is about to become a self-fulfilling prophecy. While UP has responded the City's discovery requests, that response is wholly inadequate and devoid of any substance, which has left the City with no choice but to seek delay in the schedule for filing a reply to UP's Protest. Accordingly, simultaneously with the filing of this Reply the City is filing a Motion to Compel responses to the City's discovery requests and a Motion for Extension of Time to Reply to UP's Protest. And, even if UP is correct and this matter is delayed, the City is hard pressed to understand what prejudice UP would suffer as a result of delaying the proceeding for a short time in order to allow the Federal Court to rule or to require UP's compliance with discovery. In fact, UP cannot establish any prejudice given the fact that it is proceeding, at its own risk, to run trains on the 900 South Line. The only result of a delay in the proceedings would be that UP would have to comply with the City's discovery requests, which would

. . . footnote continued on next page

fully to any further statements on these subjects. The City expected UP to come forward in response to the Application with unsupported factual statements about traffic volumes, congestion and the need to use the 900 South Line rather than other routes available in or near the City to relieve that alleged congestion. UP's Protest, dated December 28, 2001[4] fulfilled those expectations and, as anticipated, responses to the City's discovery requests are required to enable it to reply. For example, UP in its Protest makes self serving conclusory allegations such as: 1) "Grant Tower is a serious bottleneck for rail traffic moving to, from and through Salt Lake City, due to the volume of traffic moving through at low operating speeds, and the conflicting routes, where trains moving on one route will block trains on other routes"; and 2) "There are multiple advantages to the 900 South routing. The immediate advantage is that it will reduce delays to the trains that will be shifted to the 900 South routing (an estimated savings of 7.5 hours) per day." *See UP Memorandum in Support of Protest at p. 15-16.* In support of these allegations UP conveniently submits declarations from UP employees that are conclusory in nature and fail to provide the specific detail and documentation necessary to fully evaluate UP's claims. *See UP Memorandum in Support of Protest,* at Tab 5 & 9. Furthermore, UP also claims that "unless the 900 South Line is available for use during the Olympics, UP will not have an alternate route for its existing route through the Olympic Area." *See Reply of Union Pacific to Motion of Salt Lake City to Consolidate* at p. 9.

The City disputes these contentions and is entitled to discovery on these issues in order to determine their credibility and reliability of these allegations and of the declarations submitted

---

allow for this matter to be resolved on a full and complete set of facts rather than on UP's unsubstantiated and conclusory statements.

[4] UP's response was not filed at the Board on December 28, as required by the Board's order in this proceeding, but was instead placed in the hands of overnight delivery service on that day, for delivery to the City's counsel on January 2, 2002.

by the UP employees. However, UP would rather avoid discovery on this issue and requests that the City and the Board accept its statements at face value. This is simply unacceptable.

Now, in its continuing effort to stonewall the City's efforts to protect its citizens and to enforce its rights under the Franchise Agreement, UP accuses the City of attempts to delay.[5] If UP had spent its time, instead, on preparing responses to the City's discovery requests, the information would be in the hands of the City's counsel in sufficient time to permit its use in preparation of the reply within the time frame required by 49 C.F.R. §1152.26(a) and the Board's December 3 Order in this proceeding. UP's Motion for a Protective Order should be denied.

II. THE CITY'S DISCOVERY REQUESTS ARE PERMITTED, APPROPRIATE AND TIMELY AND UP'S MOTION FOR A PROTECTIVE ORDER SHOULD BE DENIED.

This Board's rules permit discovery, and no case cited by UP that limits discovery is pertinent to the circumstances of this case. The City's interrogatories and requests for production of documents request information that is not otherwise available to the City, that is pertinent to issues in this proceeding, and that constitutes an appropriate subject for discovery herein. The Motion for a Protective Order should be denied.

The Board's rules permit any party to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding." 49 C.F.R. §1114.21(a)[6]. The Board does not favor discovery in

---

[5] While the City has asked the Board to put this proceeding on hold, it is not because of the pendency of discovery disputes. The City filed the Petition seeking to hold the proceedings in abeyance before receipt of the railroad's Motion for a Protective Order. However, if UP does not provide responses to City's discovery requests, UP's self-fulfilling prophecy will come true because the City will be left with no choice but to ask for an extension of time to reply to the Protest of UP. Specifically, because the information requested by the City is essential to fully develop and explore the issues in this matter, and UP, as the railroad, is the entity that posses the information. UP, therefore, should be obligated to disclose this information to the City and the Board as it would in a traditional abandonment procedure so that the issues can be fully developed and the Board can be fully informed and can base its decision on a complete record.

[6] UP asserts that this discovery comes too late under 49 C.F.R. §1114.26(c) and that this is a further ground to issue the requested protective order. UP properly buries this argument as a makeweight at the end of its Motion. Even if

. . . footnote continued on next page

abandonment proceedings, unless "the party seeking discovery shows that the information sought is relevant and might affect the result of the case, and that it ought to be obtained through discovery rather than some other means." STB Docket No. AB-103 (Sub-No. 14), *Kansas City Southern Ry. Co. - - Adverse Discontinuance Application - - A Line of Arkansas and Missouri R. Co.*, 1999 WL 17737 (I.C.C.), Service Date January 19, 1999 at *2, *citing* Docket No. AB-441 (Sub-No. 2X), *SWKR Operating Co. - - Abandonment Exemption - - In Cochise County, AZ* (Service Date Feb. 14, 1997), *slip op.* at 2. Discovery is not favored because typically the railroad has the information it needs to make its case, and the issue in an abandonment proceeding brought by a railroad is whether the benefits from having service on the line outweigh the costs. STB Docket No. AB-459 (Sub-No. 2X), *Central R. Co. of Indiana - - Abandonment Exemption - - In Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, 1998 WL 148638 (I.C.C.), Service Date April 1, 1998, at 3.

That is not the case here. The party seeking the abandonment, the City, is not the railroad and does not have the necessary information to make its case. The City respectfully contends that adverse abandonment cases such as these where the railroad is not seeking an abandonment are the types of cases where the exception carved out by the Board for discovery is proper.[7] In other

---

this is the type of proceeding to which the cited rule applies, an implicit assertion that UP does not explain or support, the Board can waive the requirement for good cause. Here, good cause exists to waive this rule because (a) the City requires the requested information to respond fully to UP's protest, (b) there were no preliminary submissions of comments, statements of position or other pleadings that the City could use to find a clear indication of the approach UP would take here, so that the City was making a guess (an accurate one, as it turns out) as to UP's likely arguments; and (c) UP's reply within the requested time frames will enable the City to respond to UP's Protest in a way that will inform the record of this proceeding, assuming that the schedule is not placed on hold pending the outcome of the hearing in the Federal District Court in Salt Lake City on the Motion for Summary Judgment the City has filed there.

[7] Moreover, in order for the Board to fully and properly evaluate the propriety of this adverse abandonment application it must review the complete set of facts as it would in an abandonment proceeding brought by a railroad. In other words, in both an abandonment context and an adverse abandonment context the Board must review and evaluate the same information. UP should not be allowed to frustrate and impede the Board's ability to fully and properly evaluate the propriety of this abandonment application by refusing to provide the necessary information just because it opposes it.

words, the the discovery sought is relevant and will affect the result of this case, because it is the same information that responds to the reasons UP has advanced at various times for its alleged need to preserve the right to operate over the 900 South Line rather than make further improvements to Grant Tower, or rather than await the outcome of studies currently underway about making further improvements there, or rather than using other routes that present less intrusion into the lives of the City's residents.

A party seeking a protective order may do so "only after, or in conjunction with, an effort by any party to obtain relief under §§114.24(a), 1114.26(a) or 1114.31". 49 C.F.R. §1114.21(c). Section 1114.24(a) relates to objections in depositions and is not pertinent here, since the City has not sought the deposition of any UP witness. Section 1114.26(a) refers to objections to answering interrogatories, and UP has not yet submitted any objections to specific interrogatories. Section 1114.31(a) describes Motions to Compel in the event that a party refuses to answer discovery requests. UP has taken none of the steps to which §1114.21(c) refers as conditions precedent to seeking a protective order, and its Motion is therefore premature.

Moreover, this is not a typical abandonment case, either direct or adverse, and the cases cited by UP do not apply with equal force here. This case involves, essentially, a dead end spur, on which absolutely no service was provided for a number of years, and which is governed by a specific agreement that spells out the consequences of non-use. UP is trying to make a case that those triggers have not been met, and that the City's interest in controlling the use of its streets and in protecting the interests of its residents is outweighed by the needs of interstate commerce. The City's discovery requests probe the details of that case.

The discovery requests submitted by the City (both the Interrogatories and the Requests for Production of Documents) fall into 6 basic categories:

1. Information related to UP's assertion in September 2001 that it was reactivating the 900 South Line in response to requests to reroute traffic related to the Olympics;
2. Information related to the availability of routes other than the 900 South Line to move the traffic that UP asserts must move over the 900 South Line;
3. Information related to traffic moving over the 900 South Line in the past, and to UP's projection for traffic on that line in the future;
4. Information related to UP's assertion that some route other than the current route used to move traffic through Salt Lake City is necessary in order to reduce congestion and improve efficiency;
5. Information related to the railroad's attempts to sell the 900 South Line fragment that was not abandoned in the late 1990's;
6. Information related to the Franchise Agreement that is at the core of the dispute between UP and the City, and UP's assertions with respect to that Agreement.

The City has no access to this information other than through discovery. Each of these subjects is an issue in this proceeding, just as the City expected, because either the City or UP has raised them and addressed them in the Application and Protest, respectively. Are this Board, the City and the members of the public whose interests the City is attempting to protect expected to simply accept UP's statements with respect to these issues on faith? Surely not. In STB proceedings, as in other cases, the purpose of discovery is to enable the parties to develop a full record and to ensure that the Board is provided with complete and accurate information about the issues in the proceeding. UP should be required to respond to the discovery the City has filed to support the validity of its claims, and to permit the City, in its responsive pleadings due on

January 14, 2002, to respond fully and to support the issues it has raised. The information sought in discovery is directly related to the issues in this proceeding. This case is about the Franchise Agreement, about UP's use of the 900 South Line, and about its apparent claim that no other line will enable UP to move traffic as efficiently and effectively as the 900 South Line. The public's interest, not just UP's, is what is at stake here and the information the City has requested is directly pertinent to answering the question about where the public interest lies.

The information the City seeks will enable the City to respond to UP's assertions in its Reply, and will inform the Board's ability to make the decision on the City's application. Just as in a typical adverse abandonment proceeding the Board grants waivers from the informational requirements in the regulations because the applicant does not have access to the information, so too here, the Board should look past its normal reluctance to permit discovery in abandonment proceedings and permit the City to conduct discovery.

WHEREFORE, and in light of all of the foregoing, the UP's Motion for a Protective Order Denying Discovery, should be denied in its entirety.

CHARLES A. SPITULNIK
ALEX MENENDEZ
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001
(202) 842-2345

ROGER F. CUTLER
STEVEN W. ALLRED
CHRISTOPHER E. BRAMHALL
Salt Lake City Attorney
451 South State Street
Room 505
Salt Lake City, Utah 84111
(801) 535-7788

Dated: January 10, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of January, 2002 caused a copy of the foregoing Reply Of Salt Lake City Corporation To Motion Of Union Pacific Railroad For A Protective Order Denying Discovery; Motion of Salt Lake City Corporation To Compel; and Petition Of Salt Lake City Corporation For Extension Of Time To File Reply To Protest Of Union Pacific Railroad, to be served by first class mail, postage prepaid upon the following:

Robert T. Opal, Esquire
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179

Utah Public Service Commission
Herber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, Utah 84111

U.S. Department of Transportation
400 Seventh Street SW
Room 4102 C-30
Washington, DC 20590

U.S. Department of the Interior
National Park Service
Recreation Resources Assistance Division
P.O. Box 37127
Washington, DC 20013-7127

National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, DC 20002

Leon R. Fenhaus
General Chairman, BMWE
45743 308th Street
Wakonda, South Dakota 57073

John W. Barber
General Chairman UTU
307 W. Layton Avenue
Milwaukee, Wisconsin 53207

Art D' Alessandro
President AR&ASA
3 Research Place
Rockville, Maryland 20850

Governor Mike Leavitt (via certified mail)
210 State Capitol
Salt Lake City, Utah 84118

Utah State Cooperative Extension Service
Salt Lake County Government Center
2001 South State Street
Room #S1200
Salt Lake City, Utah 84190-2350

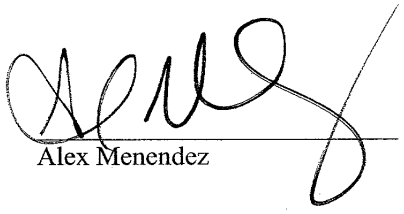
U.S. Department of Defense
OASD(PA)PIA
1400 Defense Pentagon
Room 3A750
Washington, DC 20301-1400

U.S. Railroad Retirement Board
Bennett Federal Building
Room 1205
125 South State
Salt Lake City, Utah 84138-1102

Mr. Dale Bosworth
Chief of the Forest Service
U. S. Department of Agriculture
Sidney R. Yates Federal Building
201 14th Street, SW
Washington, DC 20250

J.O. McArthur
General Chairman, BRS
P.O. Box 5100
Fallon, Nevada 89407

Rich Johnson
General President, BRC
3 Research Place
Rockville, Maryland 20850



Alex Menendez